APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 202-65

(Decided January 20, 1967)

ROYAL INDEMNITY COMPANY

v.

THE UNITED STATES AND JERSEY STATE BANK, THIRD PARTY

Richard H. Nicolaides for plaintiff, *Royal Indemnity Company.* William F. Kelly, attorney of record. *Richard A. Bartl* and *Hans W. E. Seltmann,* of counsel.

Edward L. Metzler, with whom was *Assistant Attorney General Barefoot Sanders,* for defendant.

Louis S. Papa, attorney of record for third party.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges.*

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON ITS OFFSET

COWEN, *Chief Judge,* delivered the opinion of the court:

Plaintiff, Royal Indemnity Company (hereinafter "Surety"), a Miller Act surety, claims $38,461.29 in retainages held by the Government pursuant to its contract with Albert M. Barbato (hereinafter "Contractor"), Surety's principal. Jersey State Bank (hereinafter "Bank"), contractor's assignee, was brought in as a third party pursuant to Rule 23 and claims $31,200, plus interest, of the retainages. Defendant admits that it holds $38,461.29, but seeks to offset $2,213.07, plus interest, for withholding taxes not paid by Contractor; defendant considers itself a stakeholder for the balance. Surety and defendant have moved

for summary judgment on their respective claims. The facts are as follows:

On April 12, 1963, Contractor entered into a construction contract[1] with the United States Army Corps of Engineers. On the same day Contractor and Surety entered into a Miller Act suretyship agreement. Contractor thereafter commenced work.

On May 31, 1963, Contractor, as collateral security for loans to be made by Bank, assigned to Bank any and all sums due and to become due under the contract. The assignment complied with the Assignment of Claims Act.[2] Between June 3, 1963 and September 2, 1964, Bank made loans to Contractor for use in performance of the 11030 contract, and all payments received under the contract during that time were applied to repayment of the loans. However, principal in the sum of $31,200, plus interest thereon, has not yet been repaid. That is the sum Bank here claims.

By September 1964, Contractor had completed approximately 98 percent of the contract but was unable to finish the remainder. The unfinished portion was deleted from the 11030 contract by a change order and was completed by the Government; an appropriate change in the contract price was agreed upon, leaving $38,461.29 in retainages still due.

Beginning November 20, 1964, Surety, pursuant to its Miller Act payment bond, paid $230,557.20 to Contractor's unpaid laborers and materialmen. Surety alleges that these payments were for claims for labor and materials used for the 11030 contract; Bank contends that they were for claims arising under different contracts.

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[1] DA 30-075-ENG-11030, referred to herein as the "11030 contract."

[2] 54 Stat. 1029 (1940), 31 U.S.C. § 203 (1964), as modified by 65 Stat. 41 (1951), 41 U.S.C. § 15 (1964).

Defendant admits that it holds $38,461.29 in retainages, but claims an offset of $2,213.07, plus interest, for taxes which Contractor failed to pay. No issue of fact exists as to this offset, and defendant has moved for summary judgment. Surety asserts, however, that its rights to the retainages are superior to defendant's right of offset, citing, *inter alia, Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132 (1962). Surety makes the same argument that we rejected in *Barrett* v. *United States*, 177 Ct. Cl. 367 F. 2d 834 (1966).[3] As we stated in that decision, the claim of the surety is subordinate and inferior to the right of the United States to set off the amount of taxes owed it by the contractor against the contract retainages in the hands of the Government. Defendant's motion for summary judgment on the right to offset the taxes is granted. There thus remains approximately $36,248.22 for which defendant is stakeholder and for which Surety and Bank are adverse claimants.

The law has long been settled that the rights of a surety in contract retainages are superior to those of the contractor's assignee: "the equity of the surety company is superior to the rights of the bank acquired under an assignment, whether the surety's rights are derived from the discharge of its liability on a performance bond or on a payment bond." *Nat'l Sur. Corp.* v. *United States*, 132 Ct. Cl. 724, 727, 133 F. Supp. 381, 383 (1955), *cert. denied sub nom. First Nat'l Bank* v. *United States*, 350 U.S. 902; *accord, Henningsen* v. *U.S. Fid. & Guar. Co.*, 208 U.S. 404 (1908); *Prairie State Bank* v. *United States*, 164 U.S. 227 (1896); *Nat'l Union Fire Ins. Co. of Pittsburgh* v. *United States*, 157 Ct. Cl. 696, 304 F. 2d 465 (1962); see *Pearlman* v. *Reliance Ins. Co., supra*, at 136; *United Pac. Ins. Co.* v. *United States*, 176 Ct. Cl. —, 362 F. 2d 805, 808 (1966).

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[3] Surety submitted a brief and presented oral argument as *amicus curiae* in *Barrett*.

Bank contends, however, that a proper reading of the Assignment of Claims Act leads to the conclusion that an assignee has rights in the retainages superior to those of the surety. That contention has been considered by this court and rejected. See *Nat'l Sur. Corp.* v. *United States, supra; Newark Ins. Co.* v. *United States,* 149 Ct. Cl. 170, 181 F. Supp. 246 (1960); *Nat'l Union Fire Ins. Co. of Pittsburgh* v. *United States, supra.* We find no reason to depart from our prior decisions on this question.

Bank also argues that there must be some sort of formal declaration of the Contractor's default before the superior rights of the surety arise. That contention is not supported by the case law. All that is necessary for the surety to prevail is that the contractor be in default as a matter of fact; and that as a result of such default, the surety has become obligated to pay under its Miller Act payment or performance bond. No formal declaration of default is required. See *Prairie State Bank* v. *United States, supra; Newark Ins. Co.* v. *United States, supra.*

Bank asserts, however, that in any event Surety is not entitled to summary judgment, because the sums expended by Surety were not for claims arising under the 11030 contract. Surety in its petition alleged that the sum of $220,470 was paid in settlement of claims arising from the 11030 contract. In an affidavit attached to its brief, Bank averred that "Deponent [Bank's president] is further informed and verily believes that the amounts claimed by plaintiff Surety in this action represent payments made by said Surety on contracts other than * * *" the 11030 contract.[4] No further facts or supporting documents are set forth. Surety, as Exhibit I of plaintiff's reply brief, annexes the affidavit of its assistant secretary whose statement consists of "facts known to me personally and reflected from official

[4] Affidavit of John T. Stoll, para. 8; see third party's opposition to plaintiff's motion for summary judgment, p. 6.

records of the Royal Indemnity Company to which I have access in the course of my official duties * * *." Affiant further says that Surety paid $230,557.20 to contract 11030 claimants. As Exhibit II Surety has attached copies of the drafts used to make such payments. Surety contends that, under our Rule 64(f), Bank's affidavit and allegations are insufficient to show the existence of a "genuine issue as to any material fact" and that Surety "is entitled to a judgment as a matter of law." We agree.

In pertinent part, our Rule 64(f) reads:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein * * *. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, *must* set forth *specific facts* showing that there is a genuine issue for trial. [Emphasis added.]

The language of the rule shows that Bank's averments are insufficient to present an issue of fact.

The rule for summary judgment, both under our Rule 64 and under Rule 56 of the Federal Rules of Civil Procedure, is that "mere formal denials or general allegations which do not show the facts *in detail* and *with precision* are insufficient to prevent the award of summary judgment." [Emphasis added.] *Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469 (2d Cir. 1943); *accord, e.g., Curtis* v. *United States*, 144 Ct. Cl. 194, 168 F. Supp. 213 (1958), *cert. denied*, 361 U.S. 843 (1959); *Garcia* v. *United States*, 123 Ct. Cl. 722, 108 F. Supp. 608 (1952); *Bruce Constr. Corp.* v. *United States*, 242 F. 2d 873 (5th Cir. 1957). Bank's averment is at best based on hearsay and is merely a belief held by

Bank's president. But "belief, no matter how sincere, is not equivalent to knowledge, and * * * the facts set forth in an affidavit in opposition to a motion for summary judgment must be such as would be admissible in evidence should they be given from the witness stand during the trial of a case." *Lark* v. *West*, 182 F. Supp. 794, 798 (D. D.C. 1960), *aff'd*, 289 F.2d 898 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 865.

Bank has made no effort to refute the unqualified affidavit of Surety or to contest the documents supporting the affidavit. Thus, no genuine issue of fact remains for disposition.

Therefore, we hold as follows: (1) Defendant's motion for summary judgment on its offset of $2,213.07, with interest thereon from July 16, 1965, is granted; (2) Surety's motion for summary judgment is granted in the amount of the residue of the contract retainages; (3) Bank is entitled to recover nothing herein and its cross-petition is dismissed; and (4) the claim of the New York State Department of Labor, which at one time asserted a claim against the contract retainages but has failed to appear herein after being duly cited, is forever barred.

The case is returned to the trial commissioner for a determination, pursuant to Rule 47(c) of the respective amounts defendant and Surety are entitled to recover in accordance with this opinion.

STATUTES INVOLVED

Assignment of Claims Act

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence

of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency, *Provided,*

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment

together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not

be subject to reduction or setoff for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued. (R. S. § 3477; May 27, 1908, ch. 206, 35 Stat. 411; Oct. 9, 1940, ch. 779, § 1, 54 Stat. 1029; May 15, 1951, ch. 75, 65 Stat. 41.)

DERIVATION

Acts July 29, 1846, ch. 66, 9 Stat. 41; Feb. 26, 1853, ch. 81, § 1, 10 Stat. 170.

AMENDMENTS

1951—Act May 15, 1951, provided that a bank or other financing institution taking an assignment of claims pursuant to this section would not be subject to later recovery by the Government of amounts previously paid to the bank by the assignee except in cases of fraud.

1940—Act Oct. 9, 1940, added second and third paragraphs.

Miller Act

Requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for

the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country is he finds

that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

SEC. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

SEC. 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

SEC. 4. The term "person" and the masculine pronoun as used throughout this Act shall include all persons whether individuals, associations, copartnerships, or corporations.

SEC. 5. This act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works", approved August 13, 1894, as amended (U. S. C., title 40, sec. 270), is repealed, except that such Act shall re-

main in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

Approved, August 24, 1935.